

STATE OF NORTH DAKOTA
NORTH DAKOTA STATE SEED DEPARTMENT

IN THE MATTER OF:

The Claim of Mark Krebsbach
against the Wholesale Potato Dealers Bond
of Master Potatoes, Inc., Respondent

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**RECOMMENDED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

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On August 2, 2001, the Office of Administrative Hearings received a request from Mr. Ken Bertsch, the North Dakota State Seed Commissioner (“Commissioner”), for the designation of an administrative law judge (“ALJ”) to conduct a hearing and to issue recommended findings of fact and conclusions of law, as well as a recommended order in regard to this matter. This matter involves a dispute regarding the contractual terms of potato deliveries to Master Potatoes, Inc. (“Master”), a North Dakota licensed wholesale potato dealer, and a subsequent claim by Mark Krebsbach (“Krebsbach”) against the wholesale potato dealers bond of Master through the Commissioner, under N.D.C.C. ch. 4-11 and N.D. Admin. Code ch. 74-05-01. On August 7, 2001, the undersigned ALJ was designated to preside.

On August 8, 2001, the ALJ issued a Notice of Hearing and Specification of Issues. The specification of issues was based on the allegations of the Verified Complaint filed by Krebsbach with the Commissioner on May 18, 2001. On August 20, 2001, the ALJ issued a Notice of Rescheduled Hearing. The hearing was held as rescheduled on August 23, 2001, in the North Dakota Farmers Union Headquarters, Jamestown, North Dakota.

At the hearing, Krebsbach was represented by Mr. Thomas E. Merrick, Jamestown. Mr. Merrick called only Krebsbach as a witness. Mr. John Irby, Casselton, represented Master at

the hearing. Mr. Irby called only Mr. Terry Fladeland, Master's Vice President for Sales, as a witness. Thirteen (13) exhibits were offered and admitted (exhibits 1-6, 10 and 11 were offered by Krebsbach; exhibits 7-9, 12 and 13 were offered by Master). At the close of the hearing the ALJ heard oral argument from both Mr. Merrick and Mr. Irby. Also present at the hearing were Mrs. Krebsbach, the Commissioner, and Mr. Paul Germolus, assistant attorney general, representing the North Dakota Seed Department ("Department").

After the close of the hearing, on August 27, 2001, the ALJ sent a letter to Mr. Merrick and Mr. Irby, copying Mr. Germolus, asking for additional information to supplement the record under N.D.C.C. § 28-32-25. In response to questions posed to Mr. Fladeland by the ALJ, Mr. Irby forwarded an Affidavit of Terry Fladeland with two attachments (3/2/01 letter and 2/22/01 memorandum). The Irby cover letter, affidavit and attachments are admitted into the record as exhibit 14. Also, in the same letter, the ALJ requested that the Commissioner send to the ALJ a copy of the bond that Master Potatoes, Inc. has on file with the Commissioner. Mr. Germolus sent to the ALJ a September 4, 2001, letter with four attachments, which are collectively admitted into the record as exhibit 15.

Following the receipt of exhibits 14 and 15, pursuant to instructions for doing so in the ALJ's August 27 letter, on September 13, 2001, Mr. Merrick requested the opportunity to cross-examine Mr. Fladeland regarding the responses to the ALJ's questions as found in Fladeland's affidavit and attachments. On September 17, 2001, the ALJ issued a Notice of Continued and Rescheduled Hearing which scheduled a telephone conference for the purpose of cross-examination of Mr. Fladeland and additional testimony related to his responses to the ALJ's questions. On October 4, 2001, the limited hearing was held, as scheduled. The ALJ, Mr. Bertsch, Mr. Germolus, Mr. Merrick, Mr. Irby, and Mr. Fladeland attended it. After cross-

examination by Mr. Merrick and further questioning by Mr. Irby, the ALJ, Mr. Germolus, and Mr. Merrick, the hearing was closed.

Based on the evidence presented at the hearing, and continued hearing, and the oral argument of counsel, the administrative law judge makes the following recommended findings of fact and conclusions of law.

FINDINGS OF FACT

1. On May 18, 2001, Krebsbach duly filed with the Department a Verified Complaint as required by N.D.C.C. § 4-11-15. Master did not file a written response. The Verified Complaint is not considered as evidence in this matter but is considered as a pleading that initiated this administrative matter with the Commissioner.

2. Krebsbach is a farmer operating a potato and soybean farm near Tappen, ND. He has been growing potatoes since the early 1980's. In 2000, Krebsbach grew both Shepody and Russet Burbank ("Russet") potatoes. Both of these varieties are white potatoes used primarily in processing french fries or in other types of potato processing.

3. Krebsbach does not plant potatoes unless he has a growers agreement or contract with a potato processor who will purchase his potatoes. In 2000 Krebsbach had a written contract with Simplot for a portion of his potatoes, both for Shepody and Russet. *See* exhibits 7 and 8. He also claims to have had an oral contract with Master for a portion of these potatoes, both Shepody and Russet. Krebsbach has dealt with Simplot for many years and always has a written contract with Simplot. 2000 is the first year Krebsbach grew potatoes for Master yet he did not have a written contract with Master. Krebsbach only plants enough acres to cover the potatoes for which he has contracts. Of course, the number of acres planted is based on an estimated yield. If the yields in the acreage planted are higher than expected, there may be an

“overrun” that must be sold. Those additional potatoes of the overrun generally are sold by agreement with a processor outside of any original contract for potatoes.

4. Master is a licensed wholesale potato dealer (“dealer”) in North Dakota. Master has a \$100,000 dealer bond on file with the North Dakota Seed Commissioner as required by N.D.C.C. ch. 4-11. Exhibit 15. Master had a \$50,000 bond on file until after the Commissioner notified Master on May 29, 2001, that it was required to have an additional \$50,000 bond on file with the Department no later than June 15, 2001. Id.

5. Master is a small potato processor and storage facility in Hatton, ND. It is a closely held corporation. Terry Fladeland (“Fladeland”) is the Vice President for sales for Master. Fladeland buys potatoes for Master. Master sells processed potatoes to the food service industry. Quality of potatoes is always an issue for the food service industry. Master processes about 40,000 cwt of potatoes a year in its facility. Master can also store up to 160,000 cwt of potatoes at its facility.

6. Early in the spring of 2000 Fladeland stopped at the Krebsbach farm to see Krebsbach and to talk to him about growing potatoes for Master. Fladeland said that he knew at that time that Krebsbach was growing potatoes for others, too. Subsequently, Krebsbach and Fladeland talked over the phone about the details of an oral agreement regarding the sale of Krebsbach’s potatoes to Master. There was never any written follow-up confirmation of the agreement. There was no written contract. However, it is clear that Krebsbach sold a portion of his 2000 white potato crop, both Shepody and Russet potatoes, to Master pursuant to an oral agreement or contract made with Master through Fladeland.

7. Both Krebsbach and Fladeland acknowledge that the agreement regarding the sale of Krebsbach’s potatoes to Master was affected by Krebsbach’s 2000 contracts with Simplot.

Exhibits 7 and 8 are both of Krebsbach's actual contracts with Simplot for 2000 Shepody and Russet potatoes. Krebsbach actually sent Fladeland a blank copy of both the Simplot contracts, for Shepody and Russet potatoes. Exhibits 12 and 13. Both Krebsbach and Fladeland testified that the 2000 Krebsbach Simplot contracts were intended to be guidelines for the 2000 Krebsbach and Master potato agreement.

8. The 2000 Krebsbach Shepody contract with Simplot (exhibit 12) is intended as an early delivery contract. It is titled "Potato Growing Agreement." There are no clauses for storage. It is clear that it is a sales contract and that the title to the potatoes passes to the processor upon delivery of potatoes by the Grower to the Company and acceptance of the potatoes by the Company.

9. The 2000 Krebsbach Russet contract with Simplot (exhibit 13) is also titled "Potato Growing Agreement." However, it includes various storage clauses and is clearly intended as both a sales contract and a storage contract. Storage of the potatoes under this contract is the duty of the grower, not the processor, and the processor pays the grower for storage. As with the Shepody contract, title passes to the processor upon delivery of potatoes by the grower to the processor and acceptance of the potatoes by the processor. But, clearly, delivery of potatoes by the grower under this contract would likely be after harvest and after the grower stored the potatoes for a period of time following harvest. This contract should not and could not be a contract to be applied as a guideline to the transaction between Krebsbach and Master because Krebsbach was not storing any of his potatoes for later delivery and Master was not paying Krebsbach for storage of potatoes. On the contrary, Krebsbach delivered all of his potatoes under agreement with Master directly to Master's facility at harvest and Master stored the potatoes that it did not process immediately. Therefore, the Shepody contract (exhibit 12) is

the only contract of the two that Krebsbach provided to Master that could apply to the Krebsbach and Master oral agreement.

10. In both the Shepody and Russet contracts (exhibits 12 and 13) the price to be paid for potatoes is based on usable potatoes, but once there has been delivery and acceptance of the potatoes, it is clear that the contract does not depend upon whether the potatoes are later usable. Paragraph # 6 in both contracts says that “[i]t is the intention of the parties that the sum which the Company pays to the Grower in accordance with this Section II (Basis of Payment clause), shall be payment for all potatoes delivered to the Company field run by the Grower though only a portion of the potatoes are used in the computation of said sum.” It also appears from either contract, read in its entirety, that refusal to accept potatoes must be upon delivery and pursuant to inspection. Each of the contracts (exhibits 12 and 13) also says that “[t]he Company may refuse to accept delivery of any loads, load or portion of a load of said potato crop at any time before, during, or after harvest thereof, if any of the following described conditions exist. In addition, the Company may at any time direct the independent Inspection Service to analyze the samples which have been drawn in accordance with inspection instructions on a load-to-load basis to determine if any load or loads of potatoes delivered under this agreement contain any of the following factors: ...” The contract then lists several factors such as blight, frozen potatoes, rots, etc. which may be a basis for rejection. But, again, it is clear from each of the contracts, read in the entirety, that although acceptance may be before, during, or after harvest, once there has been delivery and acceptance of the potatoes into the processor’s facility after inspection, both title to the potatoes and risk of any defect not discovered by inspection passes from the grower to the processor (the company).

11. In the 2000 transaction involving Krebsbach's Shepody and Russet potatoes with Master, both parties agreed to forego inspection and to take the potatoes straight "field run." "Field run" is a term of art in the potato growing industry that refers to acceptance of the potatoes straight from the field without consideration for dockage or other defects unspecified by contract. The potatoes are usually just cleaned and sorted in the field and transported to the processor. The term has nothing to do with other aspects of a contract such as when and how payment is to be made. It has to do with the quality of potatoes acceptable to the processor without reference to size of potato and damage to the potato. This agreement by Master and Krebsbach to not inspect the potatoes but to take the potatoes field run was apparently to save money for each. Master accepted Krebsbach's potatoes straight from the field at harvest, field run, without inspection. At the hearing Fladeland testified that as to quality at the time the potatoes were delivered, the potatoes looked good on the outside.

12. In regard to any contract with Master, there is no question about the terms of any agreement between Krebsbach and Master regarding the quantities of potatoes Krebsbach to be delivered and the quantities actually delivered, or the prices to be paid by Master for those quantities of Krebsbach's potatoes. The actual quantities and prices were not part of any Simplot contract which was used as a guideline because the contract was not with Simplot and was not in writing. But, Krebsbach did write down the terms as they were discussed by him and Fladeland (exhibit 6) and Master does not dispute the quantity and price terms. The total quantities under the oral agreement, before overrun, that Krebsbach was to deliver to Master were 12,000 bags of Shepody and 6,000 bags of Russet Potatoes. Delivery was to be made by Krebsbach at harvest to Master. *See* exhibit 6 and testimony of Fladeland and Krebsbach. Krebsbach did not actually deliver as many bags of Shepody potatoes as the agreement contemplated, but he delivered more

Russet potatoes than contemplated. The yield on Shepodys was less than Krebsbach anticipated. The yield on Russet potatoes was more than Krebsbach anticipated, but Master agreed to take the Sheopdy potatoes that were available and to take Krebsbach's Russets and his overrun of Russets, too. During the 2000 harvest Krebsabach actually delivered 6,402.4 bags (or hundred weight - cwt) of Russet potatoes to Master. He delivered 8197.6 bags of Shepody potatoes to Master. Master paid for one early load of Shepody, 651.4 bags, leaving an unpaid delivered amount of 7546.2 bags. Krebsbach also delivered 10,403.4 bags of Russet potatoes to Master from his overrun (potatoes above expected yields). *See* exhibit 4, *see also* exhibits 1-3. Master agreed to pay Krebsbach a total of \$5.82 per bag for the Russet potatoes; it agreed to pay Krebsbach a total of \$5.52 per bag for the Shepody potatoes; and it also agreed to pay Krebsbach \$2.00 per bag for Krebsbach's Russet overrun and to pay the freight for the overrun (freight on the overrun was \$8,322.72 - *see* exhibits 4 and 9). Master also agreed to pay \$5.87 per bag for the early delivered Shepody potatoes (potatoes delivered in August - 651.4 bags). The cost of freight was included in the price Master agreed to pay Krebsbach for the Russet and Shepody potatoes, except for the overrun. However, Master paid for the cost of freight for the overrun, too, it was just not included in the price per bag of the potatoes.

13. According to Krebsbach, the base price and premiums to be paid by Master for Krebsbach's potatoes in 2000 were based on Krebsbach's written contract with Simplot. According to Krebsbach payment was to be made on about 1/3 of the potatoes in the fall (by December 1) and 2/3 of the potatoes by February 15, 2001, except that payment was to be made by September 30, for early potatoes (Shepody potatoes harvested before September 1). *See* exhibit 12. At the hearing Krebsbach made frequent references to the fact that the agreement with Master was to be just like the Simplot contract (his written contract in 2000 with Simplot).

14 According to Krebsbach, Master agreed that Krebsbach would deliver “field run” potatoes, taking the potatoes right from the field at harvest after Krebsbach took out the dirt, took out the damaged potatoes, and took out the foreign material. Krebsbach said that Master wanted a field run as opposed to having a federal inspection or other inspection upon delivery to Master. Krebsbach said that Fladeland suggested this approach to avoid additional cost to both parties for inspection. When the potatoes were delivered, even though the potatoes were supposed to be “field run,” Krebsbach offered to take off 5% for dockage for the Russet potatoes. He offered to take off 2% dockage for the Shepody potatoes. For the overrun there was no dockage.

15. Krebsbach actually did deliver potatoes pursuant to the oral agreement, in the amounts indicated in FOF # 12, to Master at its facility in Hatton, ND. Exhibit 12. Master accepted delivery of all of the potatoes that Krebsbach delivered to Master field run without inspection. Exhibits 1-3 (scale tickets and receipts); *see also* exhibit 4 (summary exhibit).

16. To date, pursuant to the oral agreement, Master has paid to Krebsbach the agreed upon freight for the overrun (\$8,322.72), the agreed upon price for the one load of Shepody delivered early (\$3,855.72), and \$45,000, which Master says it paid to Krebsbach in January for delivery of Shepody potatoes in September 2000. Exhibit 9.

17. Krebsbach says that Master still owes him for all of the potatoes delivered, except the early delivered Shepody load, and that Master has only paid him the \$8,322.72 for freight for the overrun and \$3,855.72 for the one early delivered load of Shepody potatoes. Krebsbach says that Master has not paid for any other potatoes and says that Master still owes Krebsbach \$35,398.87 (6402.4 x \$5.82 x .95 - less 5% dockage) for the Russet potatoes, \$40,821.92 (7546.2 x \$5.52 x .98 - less 2% dockage) for the Shepody potatoes, and \$20,806.80 (10,403.4 x \$2.00) for the Russet overrun potatoes, a total of \$97,027.59, for all the potatoes he delivered. Krebsbach also

claims that he is due interest for late payment. Master paid interest on its late payment of the early delivered Shepody potatoes. It paid interest at 9% on that payment.

18. Krebsbach says that the \$45,000 check that Master wrote to Krebsbach in January of 2001, was not for payment of potatoes but was strictly an offset for Krebsbach paying \$45,000 to Master in December 2000 for the expense of storage of other potatoes, potatoes that were sold by Krebsbach to Simplot in 2000, but stored by Master for Krebsbach. Exhibit 10. Krebsbach says that he simply wanted to take the storage expense for Simplot potatoes in 2000 to offset 2000 income and that he did not want \$45,000 in income in 2000 from the sale of potatoes to Master. However, he said that he would treat the \$45,000 check from Master to Krebsbach in January 2001 as income for 2001. He said that the \$45,000 check he received from Master was to help him balance or average his income from year to year. He said he wished to take his expenses as an expense in 2000 (thus he paid the storage expense earlier than required, in December 2000) and he wished to take his income as income in 2001 (thus he asked for a check for his potatoes in January of 2001). Both parties knew that this “exchange of checks” was not the entire transaction between the parties.

19. One thing is certain about this potato transaction. Neither Krebsbach nor Master entered into a written contract for the sale or consignment of potatoes. It was an oral contract between Krebsbach and Master (through Fladeland) for the sale of potatoes. But, clearly, both parties meant to use the 2000 Simplot contracts as guidelines. It was an oral contract, but Krebsbach wrote down notes about the further terms of this agreement from his conversation with Fladeland. Exhibit 6. Even though he sent copies of both types of contracts to Fladeland, Krebsbach understood that only the Simplot Shepody contract was a guideline and that the Simplot Russet contract did not and could not apply except as a general guideline as to price.

Fladeland understood that both Simplot contracts both applied as guidelines, the Shepody to Krebsbach's Shepody potatoes and the Russet to Krebsbach's Russet potatoes. However, even though Krebsbach sent a copy of it to Fladeland, the terms of the Simplot Russet contract show that its essential terms cannot apply in this transaction because it is a different type of contract meant for storage of the potatoes with the Grower and later delivery by the Grower of the potatoes to the processor. In essence, then, there was an oral agreement as to the Krebsbach Shepody potatoes using the Simplot Shepody contract terms as a guideline. There was also oral agreement as to Krebsbach Russet potatoes but also using the Simplot Shepody contract terms as a guideline. The Simplot Russet contract could not be used as any other guideline in this transaction for the Krebsbach Russet potatoes, except to the extent its provisions were the same as the Simplot Shepody contract, because all the Krebsbach Russet potatoes were delivered at harvest by Krebsbach to Master and Master accepted delivery on all of them all, and Master stored all of them. The result is that Fladeland agreed to the purchase of Krebsbach's Shepody and Russet potatoes "along the lines" of the Shepody contract that Krebsbach had with Simplot.

20. Storage was a part and parcel of the overall agreement that Krebsbach had with Master though it was not a provision of the sale of Shepody and Russet potatoes by Krebsbach to Master. However, Krebsbach needed storage for other potatoes from his 2000 crop that he was selling to Simplot under written contract. Krebsbach also needed to deliver the potatoes he was selling to Master to Master's storage facility because he did not have storage for them. In other words Krebsbach needed storage both for the potatoes he was selling to Simplot and he needed to deliver the potatoes he was selling to Master for storage because he could not store them himself. Fladeland understood that this was Krebsbach's situation. Fladeland testified that a big reason for buying Krebsbach's potatoes was that Master could also make some money on storing

Krebsbach's potatoes that he had contracted to sell to Simplot. Both Master and Krebsbach believed that they could make money on that storage transaction because Krebsbach was to pay less for storage to Master than Simplot was paying him for storage. Krebsbach needed to store his potatoes for Simplot and Master had the storage to provide.

21. Fladeland testified that Master only accepted Krebsbach's Russet potatoes that it contracted to buy from Krebsbach into storage, but the terms of the oral agreement and the applicable Simplot contract indicate that Krebsbach's potatoes that Master was purchasing from him were not really accepted for storage but were accepted for processing. The potatoes did need to be stored by Master before they were processed, but Krebsbach was not paying Master for that storage or being paid for that storage by Master. Krebsbach was only paying for storage for the potatoes that he sold to Simplot, Simplot potatoes that Master was storing for Krebsbach.

22. Most, if not all, of Krebsbach's Russet potatoes delivered to Master spoiled in Master's bins and were later shipped to a cattle producer because they were unusable for processing; they had soft rot and dry rot. *See* exhibit 14 and testimony from continued hearing. Master did use 400 bags of Krebsbach's Russets for processing, however. At the August hearing Fladeland testified that Master has refused to pay Krebsbach because his potatoes spoiled in the bin and Master had to purchase replacement potatoes on the market.

23. In his affidavit, Fladeland said that Master first noticed "problems" with Krebsbach's potatoes in either late January or early February 2001. Master then sent samples of Krebsbach's potatoes to NDSU for testing. Exhibit 14. However, it was not until the time Krebsbach's potatoes were beginning to be processed, at the end of February or the beginning of March, that Master determined that Krebsbach's potatoes were unusable, they were spoiled. *Id.*, *see also* testimony at continued hearing. Yet, Krebsbach's potatoes were apparently usable at the

time of delivery in August, September, and October 2000. Master did not dispose of Krebsbach's potatoes until the end of April or early May 2001.

24. Although Master had Krebsbach's potatoes from six bins tested for spoilage, all of those six bins were Krebsbach potatoes that he had sold to Simplot, that were being stored for him by Master. *See* exhibit 14 and attachments to exhibit 14. There was no testing done on Krebsbach's potatoes that he sold to Master for processing, though Fladeland testified that they were spoiled too.

25. Master apparently believes that the reason that Krebsbach's potatoes spoiled before they could be processed was that the vines were not killed before they were harvested. However, when Fladeland visited Krebsbach's farm in the spring of 2000, he asked him to kill or remove the vines before harvest. Fladeland did not visit Krebsbach's farm during harvest. There was no evidence presented to indicate whether Krebsbach killed or removed the potato vines before harvest or sufficiently before harvest.

26. Apparently, failure to remove vines before harvest or sufficiently before harvest can result in poor skin set and thus leave the harvested potatoes more susceptible to diseases such as soft rot and dry rot. However, such diseases may have other causes, too. There is, apparently, controversy between Master and Krebsbach about whether Krebsbach timely and adequately killed or removed the vines before he harvested his potatoes and also about whether Krebsbach's potatoes were properly stored by Master.

27. When potatoes purchased by Master are processed is completely within Master's control after a grower delivers the potatoes to it. Master could have used Krebsbach's potatoes, both Shepody and Russet, in processing first if it wished, or it could have kept either or both in storage for processing later when it had used all of its other potatoes.

28. Both contracts (exhibit 12 and 13) call for payment for potatoes on December 1, 2000, and February 15, 2001. However, the Simplot Shepody contract also calls for payment by September 30, 2000, of those potatoes delivered in August 2000, then payment of \$1.50/cwt. for all potatoes delivered after August 31, and payment of the balance for the remainder of delivered potatoes by February 15, 2001. The Simplot Russet contract calls for payment of \$.25/cwt. on 80% of the potatoes stored and advance payment of \$1.50/cwt. on 80% of the estimated cwt. of potatoes in storage by December 1, 2000. It then calls for payment on February 15, 2001, or 30 days after completion of delivery, whichever occurs later, of the balance due or if delivery has not been completed, an advance payment of \$1.50/cwt. based on 80% of the amount of potatoes estimated to be in storage on November 15, 2000, and the balance due on the storage allowance. Again, however, the Simplot Russet contract simply does not apply in the situation existing between Krebsbach and Master. Krebsbach had asked for some payment from Master before December 2000. However, it is also clear that he then did not want to be paid for most of his potatoes until after January 1, 2001, so that he would have no more income from potatoes in the year 2000. Krebsbach said that he discussed specific dates for payment with Fladeland prior to the oral agreement and both understood that the payment dates would be similar to the Simplot contract. Fladeland said that payment dates were not specifically discussed but that he understood that payment dates were to be similar to the dates of the Simplot contracts. Pursuant to oral agreement, then, the potatoes were to be paid for in total by Master no later than February 15, 2001. Under either Simplot contract February 15, 2001, would be the latest payment date for full payment. Master has not paid for Krebsbach's potatoes in full.

29. Master agreed to accept Krebsbach's overrun of Russet potatoes. Fladeland and Krebsbach agreed as to price terms, with these potatoes, too, and they were accepted, field run, as the other Russet potatoes within the terms of the Simplot contract that was used as guideline.

Accordingly, the terms of payment for the overrun cannot be considered open account. See N.D. Admin. Code § 74-05-01-06.

CONCLUSIONS OF LAW

1. N.D.C.C. ch. 4-11 is the wholesale potato dealers statute. N.D.C.C. § 4-11-01(4) defines “[w]holesale potato dealer” as “any person who buys or sells, contracts to buy or sell, or handles in wholesale lots for the purpose of resale, or who handles on account of or as an agent for another, any potatoes ...” See N.D. Admin. Code § 74-05-01-01. Master is a wholesale potato dealer subject to the provisions of N.D.C.C. ch. 4-11 and N.D. Admin. Code ch. 74-05-01. In this matter, Master acted as a wholesale potato dealer through the activities of Fladeland and other employees or agents.

2. Wholesale potato dealers must be licensed and bonded in North Dakota. N.C.C.C. §§ 4-11-02, 4-11-03, and 4-11-04. See N.D. Admin. Code § 74-05-01-04. Master is licensed and bonded wholesale potato dealer under these provisions of law. Master’s bond is to cover all wholesale potato business transacted in the state. N.D.C.C. § 4-11-04. Master’s bond is in the sum of \$100,000.

3. Wholesale potato dealer bonds are conditioned “[f]or the faithful performance of ... duties as a wholesale potato dealer ...[f]or the payment when due of the purchase price of potatoes purchased ...” N.D.C.C. § 4-11-04(1) and (3).

4. A person claiming to be damaged by any breach of the conditions of a bond may file a complaint and claim with the Commissioner. N.D.C.C. § 4-11-15. See N.D. Admin. Code §§ 74-05-01-08, 74-05-01-09.

5. The Commissioner may hold a hearing on a damage claim and must report his findings and render his conclusion upon the matter complained of. N.D.C.C § 4-11-15. *See* N.D. Admin. Code § 74-05-01-09.

6. Krebsbach has filed the appropriate damage claim with the Commissioner under N.C.C.C. § 4-11-15.

7. The Commissioner, by and through the undersigned ALJ, has held a hearing under N.D.C.C. § 4-11-15.

8. N.D.C.C. ch. 41-02 is the Uniform Commercial Code law relating to sales. N.D.C.C. § 41-02-05 defines goods. N.D.C.C. § 41-02-08 requires written contracts and is a statute of frauds provision. N.D.C.C. § 41-02-69 relates to acceptance of goods.

9. A contract may be either express or implied. An implied contract is one the existence and terms of which are manifested by conduct. N.D.C.C. § 9-06-01.

10. A contract may be oral. N.D.C.C. § 9-06-02.

11. A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates. N.D.C.C. § 9-07-12.

12. If the terms of a promise in any respect are ambiguous or uncertain, the promise must be interpreted in the sense in which the promisor believed at the time of making the promise that the promisee understood it. N.D.C.C. § 9-07-14.

13. In cases when the uncertainty in a contract is not removed by the other rules on contract interpretation, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be that party. N.D.C.C. § 9-07-17.

14. Master promised to purchase Krebsbach's potatoes as a wholesale potatoes dealer but has not faithfully performed its duties as a wholesale potato dealer in this state or observed all the laws relating to the business of a wholesale potato dealer, or made payment when due of the purchase price of potatoes purchased. N.D.C.C. § 4-11-04(1), (3).

15. Potatoes are goods under the provisions of N.D.C.C. § 41-02-05(2). Although the agreement or contract for the sale of Krebsbach's potatoes was a contract for the sale of goods for the price of five hundred dollars or more, it is not required to be in writing because the parties acknowledge that an agreement or contract has been entered into for the sale of Krebsbach's potatoes; moreover, Krebsbach's potatoes have been received and accepted by Master. N.D.C.C. § 41-02-08(1), (3)(b)(c). Master admits to an agreement and contract with Krebsbach, though it has a different understanding of the exact terms of the agreement or contracts. *See Dangerfield v. Markel*, 252 N.W. 2d 184 (N.D. 1977); *Hofmann v. Stoller*, 320 N.W. 2d 786 (N.D. 1982).

16. Both parties acknowledge that a Simplot Potato Growing Agreement, either the one for a Shepody contract or the one for a Russet contract, or both, were to be the guidelines for the contracts between the parties. Exhibits 12 and 13. However, there was misunderstanding about how, exactly, and to which potatoes each of those Simplot agreements were to apply. There is no doubt that the Simplot Shepody contract was to apply, generally, to the Shepody potatoes sold by Krebsbach to Master. Both parties agree on this. The Simplot Russet contract however is a contract for the storage of potatoes by the grower and for later delivery of those potatoes to the processor. This contract cannot have been generally applied to the potato agreement between Krebsbach and Master in 2000 because Master stored the potatoes for Krebsbach.

17. Moreover, under the terms of either Simplot contract (exhibits 12 and 13), the grower agrees to deliver all contracted potatoes and upon such delivery and acceptance by the processor, title passes to the processor, with the risk of loss being borne by the processor after acceptance.

18. Krebsbach delivered all the contracted potatoes. There is no dispute about the amounts delivered and accepted by Master into its facility for processing.

19. Master had a reasonable opportunity to inspect the potatoes but it had not really done anything with Krebsbach's potatoes as late as the beginning of March 2001, except to have some of his Simplot potatoes tested for spoilage. N.D.C.C. § 41-02-69(1)(a). In fact, Master failed to make an effective rejection of Krebsbach's potatoes. Master failed to reject the potatoes within a reasonable time after their delivery. N.D.C.C. §§ 41-02-69(1)(b); 41-02-65(1). Master certainly accepted some of Krebsbach's potatoes (the Shepody potatoes) and paid Krebsbach for those potatoes. Master even accepted and processed some of Krebsbach's Russet potatoes. Master gave no indication to Krebsbach, until after it determined that the Krebsbach Russet potatoes spoiled, that it was treating the Krebsbach Russet potatoes differently. Master's activities with regard to Krebsbach's potatoes were inconsistent with Krebsbach's continued ownership of any of these potatoes. N.D.C.C. § 41-02-69(1)(c). Although the Shepody and Russet potatoes may not have been the same commercial unit, they were actually treated as part of the same potato agreement.

20. There is no evidence that all of Krebsbach's potatoes, either Shepody or Russet, were not usable at the time that Krebsbach delivered them and Master accepted them into its facility for processing and storage. Master did not inspect the potatoes or refuse delivery or reject the potatoes at that time. It was not until months later that Master discovered that the

Russets were spoiled. Only then did it say that it refused or rejected all of Krebsbach's Russet potatoes that had spoiled. Under the Simplot Russet contract Master could have refused to accept Krebsbach's Russet potatoes out of Krebsbach's storage facility. But, of course, Krebsbach did not store his own Russet potatoes; Master stored them in its facility. Once Master accepted Krebsbach's potatoes for processing and storage into its facility it had possession and title to the potatoes and had to bear the risk of loss from spoilage, if not initially, at least with the passage of a reasonable time.

21. There can be mutual assent to a contract and the contract can be binding regardless of mutual misunderstanding as to its terms. *Delzer v. United Bank*, 527 N.W. 2d 650 (N.D. 1995). There was mutual assent by both Krebsbach and Master to a contract involving both the Shepody and Russet potatoes, both as to specific amounts and price, *i.e.*, to a potato transaction involving the buying and selling of Krebsbach Shepody and Russet potatoes by Master for the eventual processing of those potatoes. Simplot contracts were to be used as guidelines and both understood that the Shepody contract was to be used as a guideline for the Shepody potatoes. But, there was mutual misunderstanding as to what was the guideline for the sale of the Russet potatoes. Even though Krebsbach sent a copy of the Simplot Russet contract to Master, along with the Simplot Shepody contract, thereby likely intending some reference to the Russet contract as a guideline, a reading of the Russet contract shows that it clearly could not have been meant to apply as a general guideline to the sale of Krebsbach's Russet potatoes to Master because it was a contract for a different type of transaction. Krebsbach testified that the Shepody contract was to apply as a guideline for the Russet potatoes, too, just as it did for the Shepody potatoes. Master did not understand the transaction that way. Fladeland testified that Master understood the agreement as two separate contracts with the Simplot Shepody contract

applying to Krebsbach's Shepody potatoes and the Simplot Russet contract applying to the Krebsbach Russet potatoes.

22. The evidence shows, by the greater weight of the evidence, that the oral agreement or contract between the parties was as Krebsbach understood it and says it occurred, the way in which he interprets it. If there was uncertainty in the way the parties each interpreted the agreement, Master caused the uncertainty. Krebsbach is entitled to interpret it differently under the circumstances. In fact, his interpretation makes the most sense. Although Master may not have known exactly how Krebsbach understood the agreement, it should have expected Krebsbach to understand it differently than Master did, especially because the Simplot Russet contract as a general guideline clearly could not have applied to this potato transaction with its obvious differences from the actual situation.

23. Moreover, it really doesn't matter whether the Russet contract is used as a guideline because Master had also accepted the Russet potatoes for processing, or for storage, as it determined, until processing. Also of consideration is Master's failure to inspect and its receipt for processing or storage of Krebsbach's entire field run of potatoes, both Shepody and Russet, and its separate and different treatment of Krebsbach's Simplot potatoes. *See* N.D.C.C. § 9-07-14; *Mills v. Agrichemical Aviation, Inc.* 250 N.W. 2d 663 (N.D. 1977). While there was uncertainty about at least a part of this potato transaction, Master as the promisor bears most of the responsibility for that, including uncertainty over the exact terms of the contract. There was no reason for Krebsbach to think that Master was treating his Shepody and Russet potatoes differently, except as to the differences that were agreed to in regard to price quality, and quantity, and the differences that were agreed to in regard to over run, and Master either knew or should have known that. When Krebsbach sent Master the two Simplot contracts as proposed

guidelines, Master should have known that the Simplot Russet contract could not have applied generally as a guideline because of the different circumstances of their transaction, yet, it did nothing to clarify the situation and it proceeded to treat the delivery of Krebsbach's potatoes sold to Master the same, as if they all were being handled under the guidelines of the Simplot Shepody contract, with the acknowledged differences. Moreover, Master was in complete control of all of Krebsbach's potatoes upon delivery by Krebsbach. Master made the determinations when and whether Krebsbach's potatoes would be used for processing or stored for later processing. It makes no sense under either of the contracts (exhibit 12 or 13) for Master to maintain that once it had received Krebsbach's potatoes after harvest on a field run basis without inspection that it could store Krebsbach's potatoes and process them as it saw fit and then much later claim that Krebsbach's potatoes were spoiled and unusable and reject them or not accept them at that time. It makes no sense under the contract and is contrary to law. Master received and accepted Krebsbach's potatoes at the time it received them into its facility for processing or storage. It took possession, had title and bore the risk of loss. It could have made agreements otherwise, but did not.

24. There is no doubt that Master received all the potatoes from Krebsbach that Krebsbach said that he delivered to Master. Master does not deny this. Receipt involves a change in possession of the goods. *Hofmann, supra*. Master received Krebsbach's potatoes, both Shepody and Russet. However, acceptance is the unilateral act of the buyer alone. Acceptance is an expression of assent by the buyer to become the owner of specific goods as the subject matter of the contract made by him with the seller. *Id.* Master signified to Krebsbach that it was retaining Krebsbach's potatoes, both the Shepody and Russet, by taking them into its possession and either processing or storing them, as Master saw fit. Master did not reject any of

Krebsbach's potatoes within a reasonable time. Clearly, Master did not reject any of Krebsbach's Shepody potatoes. It did not reject those Russet potatoes it saw fit to process. There was nothing in Master's actions or activities that signified to Krebsbach that Master was not accepting or rejecting any of Krebsbach's potatoes. Everything that Master did was consistent with the way in which Krebsbach's interpreted the potato agreement, indeed, the only way in which it could have been interpreted under the circumstances, without a written contract. In other words, Master was receiving and accepting both Shepody and Russet potatoes under the same agreement, the Simplot Shepody contract, with differences as to price quality and quantity, as agreed upon orally.

25. There is really no disagreement about the sale of Krebsbach's Shepody potatoes to Master. There is a disagreement about the sale of Krebsbach's Russet potatoes to Master. But the oral contract for the sale of Krebsbach's Russet potatoes must be construed against Master. Master is responsible to Krebsbach under its terms as understood by Krebsbach. However, the amount of payment already made is in dispute, too.

26. Master has failed to make full payment to Krebsbach by February 15, 2001, for the potatoes Krebsbach delivered to Master, which Master accepted. Therefore, Master is obligated under the terms of its bond filed with the Commissioner to pay Krebsbach for the faithful performance of Master's duties as a wholesale potato dealer, for the observance by Master of all laws relating to the carrying on of the business of a wholesale potato dealer, and for the payment by Master when due of the purchase price of potatoes purchased by it from Krebsbach. The payment by Master was due upon delivery and acceptance by Master of all of Krebsbach's potatoes, in accordance with the payment terms of the Shepody contract. The delivery and acceptance occurred when Krebsbach delivered and Master accepted the potatoes into its facility for processing or

storage. However, Master has already made some payment to Krebsbach under the terms of the agreement or contract. Master has already paid \$8,322.72 (which Krebsbach does not claim to be owed), \$3,855.72 (which Krebsbach does not claim to be owed), and \$45,000 (which Krebsbach does claim to be owed). Krebsbach claims to be owed a total of \$97,027.59, which Master has not paid him. But, clearly, the evidence shows, by the greater weight of the evidence, that Master did pay Krebsbach the \$45,000 it says that it did (*see* exhibit 9) for the sale of potatoes. There may be other agreements regarding the storage of Krebsbach's potatoes by Master, that ultimately affect the outcome of how much Master has actually paid Krebsbach of that \$45,000 (offsets). But, that is not the subject of this bond claim. It may be the subject of other legal action, however. The money was clearly paid by Master and it is claimed by Krebsbach as income for the sale of potatoes. Therefore, that payment cannot be part of the bond claim. The \$45,000 must be subtracted from the amount claimed by Krebsbach ($\$97,027.59 - \$45,000 = \$52,027.59$). Master currently owes Krebsbach \$52,027.59 plus interest for the purchase of Krebsbach's potatoes and that payment was due upon Krebsbach's delivery of the potatoes to Master's facility after harvest by Krebsbach and Master's acceptance of the potatoes into its facility for processing or storage. Payment was due under the terms of the Simplot Shepody contract no later than February 15, 2001. Exhibit 12.

27. Krebsbach is also entitled under the bond to the statutory rate of interest on the amount he is currently owed by Master (\$52,027.59) from February 15, 2001, until the date of payment under the bond. The statutory rate of interest is six (6) %. N.C.C.C. § 47-14-05.

RECOMMENDED ORDER

Based upon the foregoing findings of fact and conclusions of law, the Commissioner finds and concludes that the surety, Employers Mutual Casualty Company, is obligated to its principal, Master Potatoes, Inc., to pay Mark Krebsbach a portion of the proceeds of Bond. No.

T21 69 63, specifically \$52,027.59, plus the statutory rate of interest from February 15, 2001, until the date of full payment of that portion of the proceeds of the bond.

Dated at Bismarck, North Dakota, this 11th day of October, 2001.

State of North Dakota
North Dakota State Seed Department

By: _____
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Administrative Law Judge
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